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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 492.

THE PEOPLE OF PORTO RICO, *Petitioner,*

v.

HORACE HAVEMEYER, FRANK A. DILLINGHAM, EDWARD S. PAINE, FRANK M. WELTY, EDWIN L. ARNOLD and H. B. ORDE, co-partners doing business under the firm name and style of RUSSELL & COMPANY, Sucesores, S. en C., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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In The

Supreme Court of the United States

October Term, 1932.

No. 492.

The People of Porto Rico, Petitioner,

against

Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Frank M. Welty, Edwin L. Arnold and H. B. Orde, co-partners doing business under the firm name and style of Russell & Company, Sucesores, S. en C., Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Introductory.

After the passage of Porto Rican Act No. 49 of 1921 (Laws of Porto Rico 1921, p. 366) and after attempted assessment under that Act upon the properties owned or leased by the respondents, the respondents, as co-partners doing business under the name of Russell & Company, Sucesores, S. en C., brought suit in the District Court of the United States for Porto Rico against the Treasurer of

Porto Rico to enjoin the collection of the tax alleged to be due. The injunction was granted by the lower court and appeal was taken by the Treasurer to the United States Circuit Court of Appeals for the First Circuit. The case was there pending at the time of the passage of the Act of March 4, 1927 (44 Statutes at Large 1421). That Act amended the Organic Act of Porto Rico (39 Statutes at Large 951) so as to take away from the District Court of the United States for Porto Rico jurisdiction of any suit to restrain the assessment or collection of any Porto Rican taxes. This court held in *Smallwood* v. *Gallardo*, 275 U. S. 56, that all pending Porto Rican tax injunction suits, whether in the lower court or on appeal, should be dismissed for want of jurisdiction, and the injunction obtained by the respondents against the Treasurer of Porto Rico was, therefore, set aside by the Circuit Court of Appeals (*Gallardo* v. *Havemeyer*, 21 Fed. (2d) 1012).

On April 23, 1928, Congress passed an act for the relief of taxpayers whose suits had been dismissed by reason of the decision of this court in *Smallwood* v. *Gallardo, supra*. This act (45 Statutes at Large 447) is as follows:

> "That if in any suit pending March 4, 1927, but since abated or dismissed solely by reason of the provisions of the Act entitled 'An Act to amend and reenact sections 3, 20, 31, 33, 38 and 48 of the Act of March 2, 1917, entitled "An Act to provide a civil government for Porto Rico, and for other purposes," as amended by an Act approved June 7, 1924, and for the insertion of a new section in said Act between sections 5 and 6 of said Act, to be designated as "5a" of said Act,' approved March 4, 1927, the taxpayer had prior to such date obtained an injunction restraining the assessment or collection of any

tax imposed by the laws of Porto Rico after trial on the merits in the District Court of the United States for Porto Rico, or if in any such suit on appeal to the United States Circuit Court of Appeals for the first circuit the right of any taxpayer to an injunction restraining the assessment or collection of any tax imposed by the laws of Porto Rico had been decreed, the treasurer of Porto Rico shall enforce the collection of the tax so enjoined or decreed by a suit at law instead of by attachment, embargo, distraint, or any other form of summary administrative proceeding. Notwithstanding the provisions of any existing statute of limitations, any such suit may be instituted at any time not later than one year after the approval of this Act."

From and after the passage of this Act the People of Porto Rico could collect the taxes in issue here only by virtue of this United States statute, and the suit was brought under and because of that statute.

Argument.

A writ of certiorari in this case is sought for the purpose of securing from this court a repudiation and overruling of the settled rule that for jurisdictional purposes the citizenship of a partnership shall be determined by the citizenship of the members of the partnership. The People of Porto Rico attempted heretofore, in May, 1922, in a suit between these same parties, to have this court do what it now again seeks. Its application then was denied. *People of Porto Rico* v. *Fortuna Estates*, 259 U. S. 587.

Petitioner also seeks to have the holding of the Circuit Court of Appeals that Porto Rican Act No. 49 of 1921,

in so far as it applies to taxes upon lands of the respondent partners, impairs the obligation of contracts made in 1914 by the People of Porto Rico and the predecessor in title and the lessors of the respondent partners, reviewed by this court. It also desires to have reviewed the decision of the Circuit Court of Appeals that Act No. 49 of 1921 is invalid as a delegation of legislative power (taxing power) to administrative officials in violation of the Organic Act of Porto Rico.

The decision of the Circuit Court of Appeals for the First Circuit in connection with the question of jurisdiction is not only not in conflict with the decision of another Circuit Court of Appeals on the same matter, but is in accordance with a long line of decisions both of this court and of other Circuit Courts of Appeal.

The Circuit Court of Appeals for the First Circuit has not decided any important question of general law in a way probably untenable or in conflict with the weight of authority.

It has not decided an important question of Federal law which has not been settled by this court.

It has not decided any Federal question in a way probably in conflict with applicable decisions of this court.

The question of the jurisdiction of Federal courts is not a question of local Porto Rican law.

There is no decision of the Supreme Court of Porto Rico or any of the lower insular courts that Porto Rican Act No. 49 of 1921 does not impair the obligations of the contracts between the People of Porto Rico and respondent partners' predecessor in title and lessors or that Act No. 49 of 1921 does not delegate legislative authority to administrative officials.

The only questions in the case are questions of Federal law. The suit was brought under an Act of Congress (Act

of April 23, 1928). It was removed to the District Court of the United States for Porto Rico under Federal laws (Organic Act of Porto Rico, § 28 of the Judicial Code, 28 U. S. C. A. §71).

The District Court of the United States for Porto Rico Had Jurisdiction of the Action.

The People of Porto Rico was on one side and on the other side all of the parties were "citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico." Hence the lower court had jurisdiction. (*Porto Rico Railway Light & Power Company* v. *Mor*, 253 U. S. 345; *People of Porto Rico* v. *Fortuna Estates*, 259 U. S. 587; *People of Porto Rico* v. *Fortuna Estates*, 279 Fed. 500; *Goico* v. *Russell & Co.*, 4 Fed. (2d) 7.)

The court below had jurisdiction not only because of diversity of citizenship but also because the suit was brought under an Act of Congress (*Camunas* v. *Porto Rico Railway Light & Power Company*, 272 Fed. 924).

Petitioner seeks to have this court set aside the rule that in the Federal courts for purposes of jurisdiction the citizenship of a partnership is the citizenship of its individual members, whether under the law of the place of its origin the partnership is regarded as an entity and may sue or be sued in its partnership name. This rule is the result of the decisions in *Chapman* v. *Barney*, 129 U. S. 677, 682; *Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U. S. 449, 455; *McLaughlin Brothers* v. *Hallowell*, 228 U. S. 278; *Bruett & Co.* v. *Austin Drainage Excavator Co.*, 174 Fed. 668; *Columbia Digger Company* v. *Rector*, 215 Fed. 618;

Empire Rice Mill Co. v. *Neumond,* 199 Fed. 800 (Louisiana); *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. 500, 505; *Goico* v. *Russell & Company,* 4 Fed. (2d) 7.

The only decision contrary to the above cases is *Liverpool, Brazil and River Platte Navigation Co.* v. *Agar & Lelong,* 14 Fed. 615, but that case was expressly repudiated by the same court in *Empire Rice Mill Co.* v. *Neumond, supra.* Both cases dealt with the civil law concept of a partnership.

Petitioner seeks to have this court overturn this well settled rule by claiming that a Porto Rican partnership is not the same as an American partnership, and that a Porto Rican limited partnership is more nearly analogous to a corporation than to a partnership. To support this it attempts to retranslate various sections of the Code of Commerce and Civil Code of Porto Rico, and wherever it finds the words "sociedad" or the word "colectiva" or the word "comanditaria" or the word "anonima," it refuses to translate them, as they always have been translated, "partnership," "general partnership," "limited partnership" and "corporation," respectively, but says the words cannot be translated into English.

Petitioner is like the man in the regiment who was out of step and called attention to the fact that every other soldier in the regiment was out of step with him.

The words mentioned above are uniformly translated as "partnership," "general partnership," "limited partnership" and "corporation." They are so translated in the official text of the "Compilation of the Revised Statutes and Codes of Porto Rico" published in 1913 as Senate Document No. 813, 61st Congress. They are so translated in the translation of the Civil Code of Porto Rico revised

and published under the provisions of Joint Resolution No. 18 of 1930 (Laws P. R. 1930, p. 616), by the Legislative Joint Commission created by Porto Rican Act No. 50 of 1928 (Laws P. R. 1928, p. 320). This translation shows that all the members of the Joint Commission were Bachelors or Doctors of Law, and that the Secretary of the Commission was a Bachelor of Law.

Walton in his "The Civil Law in Spain and Spanish America," published in 1900 in Washington by W. H. Lowdermilk & Co., translates the word "sociedad" always as "partnership." In "The Argentine Civil Code," an official publication of the Comparative Law Bureau of the American Bar Association, published in 1917 by the Boston Book Company, Frank L. Joannani, the translator, translates the word "sociedad" uniformly as "partnership."

The French Civil Code is very similar to the Spanish Civil Code and in place of the word "sociedad" one finds the word "société." E. Blackwood Wright in "The French Civil Code" published in London by Stevens & Sons, Ltd. in 1908, uniformly translates the word "société" as "partnership." Mr. Wright was the Chief Justice of Seychelles, where the Code Napoleon was in force.

Can it be that words uniformly translated by lawyers into perfectly good legal English have suddenly become so different in legal meaning that they cannot now be translated?

We think that petitioner has shown no reason for the change by this court of its rule of decision laid down forty-five years ago in *Chapman* v. *Barney, supra.*

Counsel seeks to inject into the case a question which is foreclosed by the record.

The original complaint (Record, p. 87) says:

> "The defendant is a civil limited partnership organized under the laws of Porto Rico. According to the information and belief of the plaintiff, the defendant firm or entity is made up of the following persons who have associated themselves for the carrying on of the business of cultivating sugar cane under the said name in general in Porto Rico: Frank A. Dillingham, Horace Havemeyer, William H. Morgan, as regular partners, and Frank M. Welty, Edwin L. Arnold and H. B. Orde, as silent partners; the plaintiff not knowing the residence and nationality of the stated persons."

The petition in removal is to the same effect (Record, p. 6). The amended complaint (Record, p. 2) states:

> "That the defendant is a civil agricultural partnership organized as a juridical entity under the civil laws of Porto Rico with capacity to sue and be sued."

It then alleges the partners who compose Russell & Company, Sucesores, S. en C. This pleading was in English. It was signed by James R. Beverley, the Attorney General, who is an American, of which fact the court will take judicial notice.

In that amended motion to remand (Record, p. 11), it is stated that

> "* * * defendant in this case, as it appears from the complaint, is a civil partnership constituted under the provisions of the Civil Code of Porto Rico."

The case was tried upon an agreed statement of facts, which says (Record, p. 66):

> "Come now the parties hereto by their undersigned attorneys and, for the purpose of the trial

of this action by this court and any and all appeals taken herein stipulate and agree upon the following statement of facts:

* * * * * *

2. That the defendants, Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, H. B. Orde and Frank M. Welty, now constitute and at the time of the institution of this suit constituted the civil agricultural limited partnership of Russell & Co., Sucesores, S. en C. (formerly Russell & Co., S. en C.), organized under the laws of Porto Rico; that at all such times said Frank A. Dillingham was and is a citizen and resident of the State of New Jersey; said Horace Havemeyer a citizen and resident of the State of New York; Edward S. Paine a citizen and resident of the State of New York; Edwin L. Arnold a citizen and resident of the State of Florida; Frank M. Welty a citizen and resident of the State of Ohio, and H. B. Orde a citizen of Great Britain and a resident of the Dominion of Canada."

This stipulation was signed by James R. Beverley, Attorney General of Porto Rico. The stipulation is in English. The stipulation was made after the motion to remand.

We submit that petitioner has stipulated to the contrary of the position it now takes.

The long quotation in petitioner's brief (p. 21 ff.) from the case of *People* v. *Rivera Zayas, District Judge,* 29 P. R. 423, is quite inapposite. It was an opinion on an appeal taken in the Insular Court from the order of removal in the case reported as *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. 500, certiorari denied by this court in 259 U. S. 587. All proceedings in that case by the Attorney

General of Porto Rico in the insular courts were enjoined by the Judge of the District Court of the United States for Porto Rico and his action was affirmed by the Circuit Court of Appeals in *Mestre, Attorney General of Porto Rico* v. *Russell & Company, S. en C.*, 279 Fed. 44.

Although the Supreme Court of Porto Rico had no power to pass upon a question of jurisdiction arising in the District Court of the United States for Porto Rico, it is interesting to note that the court said (29 P. R. at 430; Petitioner's Brief, p. 23):

> "We need not, therefore, even decide in this case whether a *sociedad en comandita* is or is not a citizen."

All that the Supreme Court of Porto Rico held was that a *sociedad en comandita* is an entity distinct from the members that compose it, and that as *the entity* was sued in the *insular court* and as it was organized under the laws of Porto Rico, *the entity* had no citizenship distinct from the People of Porto Rico or it had no citizenship at all.

It is not denied that a partnership, whether general, limited or a partnership with share capital (*sociedad anonima*) is a juridical entity under the law of Porto Rico for the purpose of suing and being sued in the Porto Rican courts. It is a far cry, however, from that to say that a Porto Rican partnership is a corporation for purposes of Federal court jurisdiction. A Porto Rican partnership with share capital is more like a joint stock association than a corporation, but this court has held that a joint stock association is not a corporation for the purpose of conferring jurisdiction upon a Federal court. Still less is a limited partnership a corporation.

Porto Rico, like the states of the United States, has true corporations (Corporation Law of Porto Rico, Compilation of Revised Statutes and Codes of Porto Rico, p. 88).

And it is not odd that in Porto Rico the Civil and Commercial Codes contain provisions with regard to partnerships. Such provisions are common in the statute laws of all of the states of the United States.

If petitioner should succeed upon this jurisdictional ground alone and the case should be remanded by this court with instructions that it be remanded to the insular courts of Porto Rico, the case would again come through the insular courts of Porto Rico to the Circuit Court of Appeals for the First Circuit and presumably it would be decided upon the merits by the Circuit Court of Appeals in the same way.

The Circuit Court of Appeals has complete authority to review decisions of the Supreme Court of Porto Rico where the amount involved is five thousand dollars ($5,000) or more. (28 USCA., 225 (a), (d), 39 Stat. at L. 951, Sec. 43.)

The Circuit Court of Appeals for the First Circuit is, by reason of its appellate jurisdiction, given by Congress the power to pass upon the constitutionality of local laws of Porto Rico. Hence the situation is not the same as in the case where a Circuit Court of Appeals passes upon a statute of a state.

It is for this reason undoubtedly that the petitioner, on page 14 of his petition, admits that the jurisdictional question here presented may be of little or no importance in this particular case.

The Obligation of the Contracts of Respondents' Predecessor in Title and Lessors Was Clearly Impaired.

The agreed statement of facts beginning on page 66 of the record cannot well be boiled down more.

Respondents' predecessor in title and its lessors have owned water concessions on the Jacaguas River dating back as far as 1845 (Record, p. 48). In accordance with the provisions of the Public Irrigation Law approved September 18, 1908 (Laws of Porto Rico 1908, Special Session, p. 44), as amended in 1911 (Laws of Porto Rico 1911, p. 237), and as further amended in 1913 (Laws of Porto Rico, Extraordinary Session 1913, p. 54), the People of Porto Rico undertook the construction of a public irrigation system on the south coast of Porto Rico, and in the course of such work erected a dam for the impounding and storage of the waters of the Jacaguas River, which is known as the Guayabal Dam, and extends across the bed of the Jacaguas River above the intakes which the respondents' predecessor in title and lessors used for taking water under their ancient concessions (Record, p. 68).

The Irrigation Law provided that the People of Porto Rico could condemn existing water rights, in which case the fair value thereof would have been paid in cash to the owners. It also provided that the owners of concessions could relinquish them, have them valued either by mutual agreement or in the manner provided in the Irrigation Law, and be paid the amount agreed upon by receiving credits upon their proportionate part of the expense of the construction and operation of the dam. However, if

water rights were not condemned or relinquished, Section 13 of the Act of 1913 (p. 72) provided that

> "such land shall be entitled to receive from the irrigation system an amount of water which is the reasonable equivalent in value of said water right or concession."

Lands with unrelinquished concessions could not be included within the irrigation district upon which was imposed the cost of construction and maintenance of the irrigation system.

Respondents' predecessor in title and lessors refused to relinquish their concessions and they were not condemned by the Government. Thereafter the Government entered into negotiations with the owners of the concessions for the purpose of fixing the amount of water, and the time and place where it would be taken, which would be the reasonable equivalent in value under the concessions.

Contracts were made (Exhibit A, Record, p. 36; Exhibit B, Record, p. 52) under which the concession holders agreed to take regular daily amounts which averaged approximately twenty-five per cent. less than the amount specified in the concessions, and the People of Porto Rico specifically agreed to deliver the amount of water agreed upon (Record, pp. 36, 52). As well stated by the court below at page 101 of the Record:

> "It thus appears that the amounts of acre feet of water per year agreed upon in that contract were the equivalent in value of the old water rights or concessions which Fortuna Estates owned and which it had not relinquished to The People of Porto Rico, and that The People of Porto Rico agreed to deliver those amounts uniformly throughout the year, and

> further specified the number of feet to be delivered per day, and the consideration therefor was the right acquired by The People of Porto Rico to carry out its irrigation scheme and operate its dam and hold back and store therein the waters of Jacaguas River, which otherwise it could not do, for the Irrigation Act of 1908, as amended in 1911 and 1913, did not make any of the lands here in question a part of the irrigation district thereby constituted."

Difficulties arose between the Government and the respondents as to certain of the water covered by the contract with Fortuna Estates (Exhibit A, Record, p. 31 ff.), the Government claiming the right to sell it and respondents denying that right. Respondents' contention was upheld in the courts (*People of Porto Rico* v. *Russell & Company*, 268 Fed. 723).

In that case the Circuit Court of Appeals for the First Circuit held at page 729 that

> "* * * we think it is apparent from a reading of the contract that their old concessions are suspended while the contract remains in force, and that, as it is still in force, their right to the water in question depends upon the contract."

In other words, while the contract exists the Circuit Court of Appeals says respondents have no operable rights under concessions. Whether or not the concessions could once have been taxed, certainly from the time of the decision of the Circuit Court of Appeals the concessions being suspended could not be taxed. Nevertheless, they have been taxed, for by the agreed statement of facts (par. 21, Record, p. 73) we find that the properties to which the concessions are appurtenant

> "are subject to all real property taxes levied by The People of Porto Rico for insular or municipal purposes, and all of such taxes levied from 1921 to date have been paid from year to year at the same rates paid by other properties, whether included in the South Coast Public Irrigation District provided by the Irrigation Law or not included therein, and whether the owners of the land have relinquished their concessions for irrigation water or have not relinquished them."

The decision of the Circuit Court of Appeals above referred to was handed down in October, 1920, and in 1921 at the first session of the Legislature thereafter Act No. 49 of 1921 was passed, the stated purpose of which is to compel the respondents to pay a special tax for the water which they receive under the contract with the Government of Porto Rico, by way of exchange as an agreed equivalent in value to their rights under the concessions.

That Act provides in Section 1:

> "That a *special tax* is hereby levied in addition to other taxes already fixed by law, on all parcels of land which for irrigation purposes are supplied with water from the south coast public irrigation system constructed and in operation pursuant to the provisions of the Public Irrigation Law and amendments thereto, *but which under the present Irrigation Law in no way contribute to the payment of expenses for the maintenance of said system.*" (Italics ours.)

Under the Irrigation Law the Government could give only the fair equivalent of the water respondents were entitled to under the concessions. The Government and the concession owners agreed upon this amount. It was in total approximately twenty-five per cent. less than the

amount to which they were entitled under the concessions. The Government agreed to deliver this water to them at certain intakes specified in the contracts, which intakes are located upon property of respondents and its lessors. They gave up certain rights to torrential water which they had under concessions.

The claim of the Government now is that they can charge the respondents for delivering this water, using as an instrument therefor a special tax, the proceeds of which will be used under the law for not only the maintenance of the irrigation system but for the cost of its construction and for the cost of construction and maintenance of certain hydro-electric developments of the People of Porto Rico, having nothing to do with the irrigation system other than that they make use of water power provided because of the construction of irrigation dams.

The Act of 1921 puts the respondents on a par with land owners who receive waters from the irrigation service without ever having owned concessions, and puts them at a disadvantage compared with those who had water rights which were condemned for cash or were relinquished for a price which is credited upon the annual assessment as it becomes due.

A clearer case of governmental bad faith and of impairment of the obligation of a contract could not be found. The Government says to the respondents: "You have certain rights of which you cannot be deprived except by condemnation. If we condemn, you must be paid the value of your property. If, however, you will accept the fair equivalent in value for the water to which you are entitled, we will deliver it to you." Relying upon the good faith of the Government, the fair equivalent is fixed and the Government

begins to deliver it. A dispute arises and the courts hold that because of the contract the concession rights are suspended. Then the Government says: "As your concessions are suspended, and as you are bound by the contract, and as we have the power to tax, even though we have agreed under the contract to deliver you the water which is only a fair equivalent to your concession water, we will now only do this if you pay part of the cost of delivering that water to you."

It would seem that a statement of the essential nature of the transaction is all that is necessary.

We believe that the authorities cited in the opinion of Judge Bingham (Record, p. 93) are sufficient.

Section 11 of the Irrigation Law of 1913 (Laws of Porto Rico, Extraordinary Session 1913, p. 67) provides for the tax which is to be levied upon any "given tract of land included in the permanent irrigation district."

No tax is provided for in connection with the construction or operation of the irrigations works except upon the land that is benefitted thereby.

The irrigation works were not to be paid for by a general assessment upon all property in Porto Rico but were treated as local improvements, the burden of payment for which was to be borne only by land deriving benefit therefrom.

The method of fixing the amount of the taxes to be paid by the lands included in the permanent irrigation district is as follows:

The Treasurer calculates the amount of interest and principal or sinking fund due upon outstanding irrigation bonds for the ensuing fiscal year and adds thereto the amount due upon credits for the ensuing year on account

of water rights or concessions which have been valued and relinquished. He then adds the amount estimated by the Commissioner of the Interior as the probable cost of operating and maintaining the irrigation system for the ensuing year. There is then either added to or subtracted from this total the estimated amount of any deficit or surplus from operations for the current fiscal year, and from this total there is then subtracted the amount estimated by the Commissioner of the Interior as receipts for the ensuing year from the sale of any water power developed in connection with the irrigation system, and the amount estimated by the Commissioner of the Interior as receipts for the ensuing year from any other sources except from the issues of bonds and special assessments upon the land in the permanent irrigation district. To the total so determined the Treasurer adds two per cent. as a margin of safety, and the amount thus determined constitutes the total sum to be assessed for the ensuing fiscal year "upon the lands at the time included in the permanent irrigation district."

It will thus be seen that the total cost of building and operating the irrigation system is made a charge upon the land benefited thereby and included in the permanent irrigation district. (Laws of Porto Rico, Extraordinary Session 1913, Sec. 11, quoted at page 69 of the petition for certiorari.)

Section 3 of the Public Irrigation Law (Laws of Porto Rico, Special Session 1908, p. 46) is as follows:

> "The proceeds of the sale of the bonds and all moneys accruing by reason of assessments of taxes and sales of water and power within the irrigation district shall, subject to the provisions of Section 29 of this Act, be deposited in the Treasury of Porto

> Rico in a trust fund to be known as the 'Irrigation Fund', which fund may be subdivided for statistical purposes as the auditor may prescribe. *All expenditures for the construction and maintenance of the irrigation system and all payments of interest and principal of any debt incurred for the construction of the said system, shall be payable from the said trust fund* upon warrant of the auditor, countersigned by the Governor." (Italics ours.)

In Section 2 of Act No. 49 of 1921 it is provided:

> "This tax shall be levied and collected by the Treasurer of Porto Rico at the same time as any other tax imposed by the Public Irrigation Law, and the *moneys collected shall be covered into the Insular Treasury to the credit of a special trust fund known as the 'Irrigation Fund', to be invested in the same manner and for the same purposes provided by the Public Irrigation Law and laws amendatory thereof.*" (Italics ours.)

Thus it will be seen that though the Irrigation Law provides for the payment through the "Irrigation Fund" by the lands included in the permanent irrigation district, the owners of which are benefited by this public improvement, of the total cost of building and operating the irrigation system, the moneys sought to be collected from the respondents under Act No. 49 of 1921 must by the words of the law itself go into this "Irrigation Fund" and be used for the payment not only of the cost of maintaining an improvement paid for by special assessment, but also for the cost of constructing the improvement which, as already provided by law, must be paid for in full and will be paid for by those benefited thereby.

Act No. 49 of 1921, therefore, provides for a tax which is not necessary to defray any of the expenses for the construction or operation of the irrigation system, for the Irrigation Law itself provides for the payment of such expenses by the lands benefited by the works.

The tax is plainly not a special assessment tax. It is payable only, however, by the owners of lands receiving by contract from the Government the equivalent of water due under concessions which the Government cannot take away from them without condemnation proceedings.

Those who had concessions and did not relinquish them receive no benefit from the irrigation system. The general mass of property owners in Porto Rico receive no benefit from the irrigation system. The general mass of property owners, however, are not taxed for the cost of constructing and maintaining the irrigation system. The respondents under the Law of 1921 are taxed.

The Law of 1921 in question here attaches to the contracts between the Government of Porto Rico and respondents' predecessor in title and lessors a burden not placed upon the respondents by the terms of the contracts. The Government is required under those contracts to deliver water at certain specified intakes and in certain amounts day by day. Whether they carry it there in buckets is immaterial. If they carried it in buckets certainly they could not tax the respondents with the cost of the buckets, nor could they charge the respondents with the wages of the carriers of the buckets. That they have built an irrigation system which may be used in delivering the water makes no difference. The nature of the irrigation system was known when the contracts were made. It must be assumed that it had been partly, if not wholly, completed.

The Government knew that it had to be maintained. It had provided that the total cost of its maintenance be borne by the lands in the irrigation district. Had it intended to charge respondents' predecessor in title and its lessors with any part of the cost of maintenance, provision to that effect should have been made in the contract.

The concession owners who contracted with the Government contracted in view of the provisions of the Irrigation Law. To attempt now to collect from them any part of the money necessary either for the construction or the maintenance of the irrigation system is beyond question an impairment of the rights which they have under their contracts, and therefore invalid.

How little the Government regards the sanctity of contracts is apparent from the following statement in petitioner's brief at pages 47 and 48:

> "But the Government regards the question whether the lands in question are specially benefitted by the development and maintenance of the irrigation system, otherwise than by the mere delivery of the amount of water stipulated in the contracts, as one for determination by the insular Legislature in its discretion, and one which that Legislature has in effect determined by the Act of 1921."

It necessarily follows from this that year by year, so long as the irrigation system exists, the insular Legislature may have a new thought upon the subject and may determine from year to year that in its opinion the lands in question are benefited more and more and should pay other or additional taxes.

The mere statement of the Government's position is its own refutation.

Act No. 49 of 1921 Delegates to Administrative Officers the Legislative Function of Levying the Tax and is Void.

Section 1 of Act No. 49 of 1921 (Laws of Porto Rico, 1921, page 366), provides:

> "That a special tax is hereby levied in addition to other taxes already fixed by law, on all parcels of land which for irrigation purposes are supplied with water from the southern coast public irrigation system constructed and in operation pursuant to the provisions of the Public Irrigation Law and amendments thereto, but which under the present Irrigation Law in no way contribute to the payment of expenses for the maintenance of said system."

Section 2 provides the method by which the Treasurer of Porto Rico fixes the total number of acres receiving water from the irrigation system; provides for an estimate by the Commissioner of the Interior of the cost of operaing and maintaining the irrigation system during each fiscal year; and then provides that the Treasurer shall divide the amount estimated by the Commissioner, plus any deficit or less any surplus from the preceding year's operations, by the number of acres receiving water from the irrigation system; and the quotient it is said:

> "shall be and shall constitute the tax per acre which shall be levied during said subsequent fiscal year on all tracts supplied with water from the southern coast public irrigation system, and which in no other manner are subject to the payment of a tax to meet the cost of the said irrigation system.

> This tax shall be levied and collected by the Treasurer of Porto Rico at the same time as any other tax imposed by the Public Irrigation Law, * * *."

From the above it will be seen that Act No. 49 of 1921 gives the Treasurer of Porto Rico in conjunction with the Commissioner of the Interior the right in his absolute discretion to determine those who shall pay the tax, what the total amount shall be, and the rate. Not only does the act do this but in addition it gives to the Treasurer the right to levy. There could not be a more flagrant instance of delegation to administrative officials of the power to take private property in the guise of taxation.

The exercise of the taxing power is a function which is legislative and not administrative.

Legislative functions cannot be delegated to administrative officials.

In 37 *Cyc.*, page 725, we find these words:

> "It is not competent for the legislature to delegate its power of taxation, wholly or in part, to either of the other departments of government, or to any individual, private corporation, officer, board, or commission."

In *Cooley on Taxation*, 4th Edition, Volume I, page 184, the learned author says:

> "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system, and, when properly under-

> stood, admits of no exception. And it is applicable with peculiar force to the case of taxation. The people have created a legislative department for the exercise of the legislative power; and within that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect. The people have not authorized this department to relieve itself of the responsibility by a substitution of other agencies. The power to impose taxes being purely legislative, the legislature cannot delegate the taxing power, * * * either to the executive department of government or to the judicial department, * * *."

The reason for the exercise, solely by the legislature, of the power to tax is found in the opinion of Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, at page 428:

> "The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.
>
> The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse * * *."

The taxing act must not only lay down the method by which administrative officials are to assess the tax but it must fix the amount to be collected either as a sum certain or by selecting the subjects of the tax and declaring what the rate shall be.

We read in *Cooley*, Volume I, page 194:

> "The nondelegable powers, *i. e.*, the powers which cannot be delegated to merely ministerial or judicial officers, include the selection of the property to be taxed, * * * the fixing of the amount of the tax to be imposed, the fixing of the rate of taxation, * * *."

And again in Volume 3, page 2044:

> "* * * a levy is the legislative act, whether state or local, which determines that a tax shall be laid, and fixes its amount * * *. It is to be distinguished from an assessment, although sometimes the term is loosely used as including the assessment. The 'levy' fixes the subject and rate of taxation and is a legislative function; the 'assessment' consists in making a list of the taxpayer's property and fixing its valuation, and is *quasi* judicial."

A case almost directly in point is *Van Cleve* v. *The Commissioners*, 71 New Jersey Law 574. In this case the act under consideration authorized the levying of a sewer tax on a district in an amount, depending solely on the judgment and discretion of a commissioner, up to nine million dollars for construction and in an unlimited amount for maintenance. The ratio of assessment for maintenance was to be based on the amount of sewage discharged into the sewers. It was held that the act was unconstitutional and invalid as an attempted delegation of the legislative function of determining the amount of the tax. The court said at page 581:

> "Every system of taxation consists of two parts —the elements that enter into the imposition of the tax and the steps taken for its assessment and collection. The former is a legislative function, con-

> served by constitutional prescriptions; the other is mere machinery. The latter may be delegated to other than governmental agencies; not so the former. Matters of computation, appraisement, adjustment and such like, involving mere certainty of detail, follow the delegable power, * * *; but no element that enters essentially into the tax itself may be so delegated (citing *State* v. *Sickles,* 4 Zab. 125; *State* v. *Koster,* 9 Vroom 308; and *Munday* v. *Rahway,* 14 *Id.* 339) * * *: 'These decisions are precedents in our own courts, affirming the want of power in the legislative body in which the power of taxation is vested to delegate the authority to others to determine in its judgment or discretion the amount to be raised by taxation'."

And again at page 583:

> "* * * this court is unequivocally committed to the doctrine that the legislature of this state, in which the governmental power of taxation resides, does not possess the power to delegate * * * the authority to determine, in its judgment or discretion, the amount to be raised by taxation, to which obviously must be added that such authority is in effect so delegated if such body may be empowered to levy taxes to the amount of an indebtedness to be incurred by it in its judgment or discretion."

In *Parks* v. *Board of Commissioners,* 61 Fed. 436, a case holding invalid an attempted delegation of the duty to levy special assessments, at page 437, appears the following language:

> "Local assessments are an exercise of the taxing power. * * * The rule that legislative authority cannot be delegated applies to local assessments, the same as to other taxes * * *.

* * * Can a tax be arbitrarily forced upon the taxpayers of a county, either by individuals or by officials in whose appointment they have no voice? The power of taxation is a power inherent in all governments. In a constitutional government, the people, by the constitution, confer it on the legislature. It is one of the highest attributes of sovereignty. It includes the power to destroy. It appropriates the property and labor of the people taxed. Unrestrained power of taxation necessarily leads to tyranny and despotism * * *.

* * * Of all the powers of government the one most liable to abuse is the power of taxation. If placed in hands irresponsible to the people of the district to be taxed, its abuse is a mere question of time. * * * There is no limit to the cost of these improvements, and the taxpayer is absolutely without means to check or control abuses that naturally follow arbitrary and irresponsible power over the property of others. The act is a plain violation of the principle of self-taxation, and a clear invasion of the right of property. The people, by the constitution, did not authorize the legislature to so jeopardize the right of property. The legislature is not the fountain—not the source—of power. Under our system of government the legislature can exercise only such powers as the people have delegated to that body, either expressly or by necessary implication, by the constitution. All rights not so delegated are retained by the people. The right to life, liberty, and property is among the inherent and inalienable rights that the people did not commit to the legislature. Constitutions are adopted and governments administered for the protection, and not for the destruction, of these reserved rights of the people. *People* v. *Morris*, 13 Wend. 328; 1 Blackw. Tax Titles, §§15, 16. Illegal or oppressive taxation is destructive of

> the right of property, and is not government, under the constitution; but is misgovernment."

The best that can be said for Act No. 49 of 1921 is that the legislature desired to get money from the respondents and was not considering any constitutional limitations on the methods to be applied.

The Legislature neither fixed a flat rate of taxation per acre of land, per acre foot of water, nor did it fix the total amount of the tax to be levied.

The Treasurer determined the number of acres receiving water, whether included in the irrigation district or receiving water under contracts such as those of the respondents.

The amount of the tax was wholly fixed by an estimate made either by the Commissioner of the Interior or by his subordinates and certified by him. That his estimate need not be exact is shown by the provision in Section 2 that there should be deducted from his estimate any surplus from the preceding year, or added to his estimate any deficit from the preceding year.

Petitioner claims the tax in question to be a special assessment. It bears none of the ear-marks of a special assessment.

It is elementary that the basis of any special assessment is a corresponding benefit conferred by the taxing authority. In *McQuillan on Municipal Corporations*, Vol. V, at page 4378, the author says:

> "* * * the fundamental theory that must be adhered to in imposing special assessments on property, and from which alone the right is derived to impose such assessments, is that such property derives a benefit from such improvement commensurate with the amount of the assessment imposed upon it."

A violation of this principle in levying a special assessment constitutes the taking of property without due process of law.

In *Thomas* v. *Gain*, 35 Mich. 155, at page 162, the court says:

> "But it is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses."

If a special assessment for a public improvement exceeds the value of the benefit to the property assessed, it constitutes, as to the excess, a taking of property without due process of law. (5 *McQuillan on Municipal Corporations*, pp. 4455-4457.) This principle the Public Irrigation Law recognizes with regard to all properties *included within the irrigation district.*

The tax assessed under Act. No. 49 of 1921 on respondents' lands will vary from year to year and will necessarily have no relation to the year by year benefits from the use of the water.

In theory the benefits accruing to property from a betterment supporting a special assessment tax must be fixed before the tax is assessed. The Irrigation Law did not fix these benefits but provided that whatever the cost was and whatever the ratio between benefit and cost, nevertheless the total cost not only of construction but of operation must be borne by the properties included in the permanent irrigation district. The total cost of the improvement was therefore assessed against the lands in the permanent irrigation district. From that time on no other tax could be levied by way of a special improvement tax for the expense of constructing and operating the irrigation system.

Nevertheless, Act No. 49 of 1921, which is the law in question here, attempts to fasten on the respondents' land a part of the cost of construction and operation, the payment of which in full had theretofore been assessed or provided to be assessed against the property in the permanent irrigation district.

It is well settled in the law of taxation that property shall not be taken under a tax levy without the taxpayer having had an opportunity to be heard. A hearing is a necessary element of that due process which is guaranteed.

In *Londoner* v. *Denver*, 210 U. S. 373, the court dealt with a special assessment for the cost of paving a street upon which the taxpayer's property abutted. No provision was made in the law for a hearing, and this court said at page 385:

> "* * * where the legislature of a State * * * commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."

To the same effect is *Charles* v. *Marion*, 100 Fed. 538, 543.

Act No. 49 of 1921 makes no provision for notice, hearing or appeal. It does not concern itself with the actual benefits to be received year by year, and the Legislature had no intention of having the tax based upon benefits received. The sole purpose of the Legislature was to penalize the respondents.

The Irrigation Law provided for this hearing, and provided for review by the courts. Act No. 49 of 1921 does not, and this omission is not saved by the provisions of Sections 308 and 310 of the Political Code (Compilation of the Revised Statutes and Codes of Porto Rico, Sections 2960 and 2962) which do not deal with special assessments.

Counsel for petitioner has not pointed to a single case where it has been held that an administrative official can determine the amount which will be levied year by year for the maintenance of a public improvement, which amount shall be assessed by the tax collecting authority upon property selected by another administrative official. Many statutes provide that health authorities, school authorities or police authorities shall determine what amount is needed for health, school or police purposes, and require the local taxing authority to include that amount in the amount to be raised by taxes, but in that case the amount of the tax levy is fixed not by the health, school or police board but by the municipal legislative authority which determines the total amount to be assessed for all municipal purposes and assesses it.

The cases of *Van Cleve* v. *The Commissioners, supra,* and *Parks* v. *Board of Commissioners, supra,* are determinative of the question here involved.

Conclusion.

Petitioner in giving reasons why this court should grant the writ of certiorari does not feel bound by the record.

On page 15 of the petition it says:

> "The rich and powerful sociedad respondent in this case is not, by any means, the only one of its

kind, owning property and doing business in the Island, but composed exclusively of foreign members."

It does not appear from the record that the respondent partners are rich or powerful, nor that there are any partnerships of a similar character in Porto Rico. It is astounding, however, that the Attorney General of Porto Rico, the Judge Advocate General of the Army and two officers of the Judge Advocate General's Department of the Army, should refer to a partnership, four of the members of which are Americans, as "foreign."

The Federal court in Porto Rico was established for the purpose of assuring to citizens of the United States and foreigners not domiciled in Porto Rico a tribunal free from local prejudice. In the District Court of the United States for Porto Rico there is such a tribunal.

Is there any reason why English speaking citizens of the United States should not be able to try their cases in a court where English is the official language? Why should they be compelled to try their cases in courts where Spanish is the only language used?

This court is not concerned with the vulnerability in case of attack of the Porto Rico Irrigation Law. Suits for the repayment of moneys collected as taxes in Porto Rico can only be brought if the taxes were paid under protest. There is nothing in the record to show that any taxes levied under the Irrigation Law have been paid under protest.

Respondents are entitled to have their litigation decided upon the issues in that litigation. They are not concerned with what might happen to the People of Porto Rico if in

some other forum and at some other time it should be held that the Irrigation Law of Porto Rico is defective.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS E. NEAGLE,
Attorney for Respondents.

New York, November, 1932.